A **GOVERNMENT OF INDIA v. PETROCON INDIA LIMITED**

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
ABDULL HAMID EMBONG FCJ
ZAINUN ALI FCJ
B MOHAMED APANDI ALI FCJ
RAMLY ALI FCJ
[CIVIL APPEAL NO: 02(I)-40-04-2014(W)]
16 MAY 2016

C ***ARBITRATION:*** *Arbitration tribunal – Jurisdiction – Partial award by arbitration seated in London – Application to set aside partial award – Whether Malaysian courts had jurisdiction to hear application – Whether juridical seat of arbitration was question of law dependent on contract and surrounding circumstances – Whether filing of application in Malaysia showed acceptance of*
D *Kuala Lumpur as seat of arbitration – Whether change in juridical seat of arbitration within contemplation of parties – Whether juridical seat shifted to London with consent of parties – Whether judicial seat shifted away from Kuala Lumpur*

The Government of India ('the appellant') and Petrocon India Limited
E ('the respondent') were parties to a Production Sharing Contract ('PSC'), which was in respect of the development of petroleum resources in an area in India known as the Ravva Oil and Gas Field. There were three other parties to the PSC. Disputes arose between the appellant and the respondent in respect of the PSC and pursuant to the terms of the PSC, the appellant
F issued three notices to arbitrate to the respondent. The arbitral tribunal had, on 28 March 2003, fixed a tentative preliminary meeting of the arbitration to be held in Kuala Lumpur in the week beginning 19 May 2003 but due to the outbreak of SARS epidemic, the arbitral tribunal shifted the venue of its sittings to Amsterdam. On 30 June 2003, the preliminary meeting of the
G arbitration was held in Amsterdam and directions in respect of the conduct of the arbitration were given. Subsequent hearings and proceedings were then held in London. The appellant's application for interim relief was fixed for hearing on 26 September 2003 in London. By a consent order made in London, the arbitrators recorded that the seat of the arbitration was shifted
H to London. A further case management of the arbitration was fixed in London and an arbitral tribunal was constituted and arbitration proceedings commenced. Upon hearing the parties, the arbitral tribunal published their partial award dated 31 March 2005. The appellant filed an originating motion ('encl. 1') for an order that part of the partial award dated 31 March 2005 be set aside or alternatively for an order that the relevant part of the
I award be remitted to the arbitral tribunal for reconsideration and obtained leave to serve encl. 1 out of jurisdiction. The respondent filed an application in encl. 9 to set aside encl. 1, leave to serve out of jurisdiction and service

of encl. 1. The respondent objected to the jurisdiction of the High Court under O. 69 of Rules of High Court 1980 ('RHC 1980') on the ground that 'the seat of the arbitration was no longer Kuala Lumpur'. The High Court ruled in favour of the respondent and held that it had no jurisdiction over the partial award because the seat of arbitration was no longer Kuala Lumpur as it had shifted to London. It was held that the curial law, that is the law governing the arbitration proceedings, would be the laws of England and therefore any challenge to the partial award ought to be filed before the competent courts in England. The appellant appealed to the Court of Appeal. Simultaneously, the appellant sought a declaration under s. 9 of the Indian Arbitration and Conciliation Act 1996 before the Delhi High Court that the seat of arbitration was Kuala Lumpur ('OMP'). The respondent objected to the application but was rejected by the Delhi High Court and hence, the respondent filed a Special Leave Petition ('SLP') to the Supreme Court of India. The Supreme Court of India allowed the respondent's appeal resulting in the respondent taking steps to revive the London proceedings by seeking a declaration that the permanent seat of arbitration was London. The appellant, on the other hand, brought an anti-suit injunction against the respondent in the Delhi High Court to restrain the respondent from continuing with the London proceedings. However, the Delhi High Court declared, *inter alia*, that the juridical seat was put in issue before the Supreme Court by the respondent and the conclusion of the Supreme Court constituted *res judicata* between the parties. The Delhi High Court issued the anti-suit injunction against the respondent and thus, the respondent appealed to a full bench. The Malaysian Court of Appeal held that art. 34.12 of the PSC was concerned only with 'venue' and that with the change of venue to London, English law was the governing law. The Court of Appeal however disagreed with the High Court on the issue of 'seat', holding that the seat of arbitration is determined by the governing law of the arbitration agreement and accordingly concluded that London was the juridical seat because English law was chosen as the law of the arbitration. Dissatisfied, the appellant applied for leave to appeal to the Federal Court on the following questions of law: (i) whether the juridical seat of arbitration was a question of law dependent on the contract and its surrounding circumstances, whereas the venue of the arbitration was a matter of geographical convenience of the parties; (ii) where a contract provides for a place of arbitration, and also for a specific amendment procedure to change any of its clauses, whether a legal change in the venue could be brought about other than in accordance with the prescribed amendment procedure; and (iii) whether the respondent was precluded by estoppel and *res judicata* following the judgment of the Indian Supreme Court from contending that the juridical seat had shifted away from Kuala Lumpur.

A B C D E F G H I

A **Held (dismissing appeal with costs)**
Per Arifin Zakaria CJ delivering the judgment of the court:

(1) The seat of arbitration determines the curial law that will govern the arbitration proceedings. The seat refers to the legal seat rather than the geographical seat. It is a permanent or fixed seat which can only be
B changed by consent of parties to the arbitration and must be distinguished from the physical or geographical place where the arbitration was held. In the case of place of arbitration, it can be shifted from place to place without affecting the legal seat of the arbitration. (para 33)

C **(2)** The term used in the arbitration clause in this case was 'venue' rather than 'seat'. The venue of arbitration as stated in art. 34.12 was Kuala Lumpur, Malaysia, while the law governing arbitration agreement was English law. In the absence of any provision for seat of arbitration as such, Kuala Lumpur which was named as the venue of arbitration, could
D be deemed to be the seat of the arbitration. If the word 'venue' in art. 34.12 was merely a reference to the geographical or physical seat, it would not have been necessary to have it inserted in the agreement because the geographical seat may be changed at any time at the convenience of the parties. Since the parties had expressly named Kuala
E Lumpur as the 'venue', the word 'venue' must be construed to mean 'seat'. (paras 30 & 36)

(3) The word 'venue' or 'seat' is also often used interchangeably in international arbitrations. In the present case, at the start of the arbitration proceedings, Kuala Lumpur was commonly accepted as the
F seat of arbitration. This, coupled with the filing of the application to set aside the partial award in the Kuala Lumpur High Court by the appellant, went to show that the appellant had accepted Kuala Lumpur as the seat of arbitration. It is trite law that such a challenge can only be made in the jurisdiction which is the seat of arbitration. Accordingly,
G the word 'venue' in cl. 34.12 should, on its proper interpretation, be construed to mean seat of arbitration, as opposed to the geographical place for arbitration. (para 37)

(4) Further, a change in the seat of the arbitration was within the contemplation of parties as reflected in art. 34.12 of the PSC. The words
H in the clause clearly gave the parties the flexibility to change or shift the 'venue' of the arbitration to a place other than Kuala Lumpur, with concurrence of the parties. Since the order made in London was a consent order, the arbitral tribunal would not have recorded it as such without the consent of the parties. (para 38)

I **(5)** Article 35.2 of the PSC does not govern the arbitration agreement, as the latter was a distinct and separate agreement from the underlying agreement. This was further fortified by the fact that by virtue of

art. 34.12 of the PSC, the arbitration agreement was governed by the laws of England. Under s. 7 of the English Arbitration Act 1996, arbitration agreement is to be treated as a distinct agreement from the underlying agreement. Consequently, the arbitration agreement contained in art. 34 of the PSC ought to be treated as a separate and distinct agreement from the underlying contract. Therefore, art. 35.2 of the PSC did not apply to the arbitration agreement. (paras 40 & 41)

(6) The term 'unless the parties otherwise agree' in art. 34.12 distinctively gave the parties the right to change the juridical seat of arbitration. The consent order reached in London was made by the arbitration tribunal in pursuant of the provision. Therefore, the contention that the consent of 'all the parties' as stipulated by art. 35.2 was required to change the seat of arbitration could not stand up to scrutiny as art. 34.12 specifically employs the term 'the parties' instead of 'all the parties' which is found in art. 35.2 of the PSC. Further, the term 'the parties' in art. 34.12 referred to the parties to the arbitration rather than 'all the parties' to the PSC. It could not be the intention of the parties that any change in the juridical seat of arbitration should require the consent of 'all the parties' who may not be parties to the arbitration. For those reasons, the term 'the parties' in art. 34.12 was clearly directed to parties to the arbitration as distinct from parties to the PSC. In the circumstances, art. 35.2 had no application to the arbitration agreement which was governed specifically by art. 34 of the PSC. (paras 42 & 43)

(7) It is trite law that a decision of a court not clothed with the necessary jurisdiction would not give rise to *res judicata*. Having ruled that the Delhi High Court lacked the jurisdiction to entertain the appellant's petition (respondent in the SLP), it was no longer necessary for the Indian Supreme Court to delve into the issue of the seat of arbitration. The ruling and/or observation made by the Indian Supreme Court on that issue was of no consequence and did not have the effect of barring the respondent from re-agitating the issue before the Malaysian court. The ruling made by the Indian Supreme Court beyond the issue of jurisdiction must be taken as mere *obiter dicta* with no binding effect on the parties. Hence, the observation of the Indian Supreme Court could not be pleaded as *res judicata* barring the respondent from raising the same before the Malaysian courts. (paras 48 & 49)

(8) It is settled law that for issue estoppel to operate against a party, the decision on an issue must have been a 'necessary step' to the decision or 'a matter which was necessary to decide, and which was actually decided, as the groundwork of the decision', *ie*, the issue in question must have been litigated between the parties and was material to the decision of the court. In the present case, the issue of seat of arbitration could not fall within the above definition, as the primary issue before the Indian Supreme Court was whether the Delhi High Court had

jurisdiction to entertain the OMP, which was answered in the negative. Therefore, the respondent was not barred by issue estoppel from litigating the same before the Malaysian court. (paras 53-55)

Bahasa Malaysia *Headnotes*

Kerajaan India ('perayu') dan Petrocon India Limited ('responden') adalah pihak-pihak kepada Production Sharing Contract ('PSC'), yang berkaitan dengan pembangunan sumber petroleum di satu kawasan di India dikenali sebagai Ravva Oil and Gas Field. Terdapat tiga pihak lain kepada PSC. Pertikaian berbangkit antara perayu dan responden berkaitan dengan PSC dan berikutan terma-terma PSC, perayu mengeluarkan tiga notis timbang tara kepada responden. Tribunal timbang tara, pada 28 Mac 2003, menetapkan timbang tara awalan sementara untuk diadakan di Kuala Lumpur pada minggu bermula 19 Mei 2003 tetapi disebabkan penyebaran wabak SARS, tempat bersidang tribunal timbang tara dipindahkan ke Amsterdam. Pada 30 Jun 2003, pertemuan awalan timbang tara diadakan di Amsterdam dan arahan-arahan berkaitan tindakan timbang tara diberikan. Perbicaraan dan prosiding seterusnya dijalankan di London. Permohonan perayu untuk relief sementara ditetapkan untuk perbicaran pada 26 September 2003 di London. Melalui perintah persetujuan yang dibuat di London, penimbang tara-penimbang tara merekodkan bahawa tempat timbang tara bersidang dipindahkan ke London. Pengurusan kes selanjutnya bagi timbang tara tersebut ditetapkan di London dan satu tribunal timbang tara dibentuk dan prosiding timbang tara dimulakan. Selepas mendengar pihak-pihak, tribunal timbang tara menerbitkan sebahagian award bertarikh 31 Mac 2005. Perayu memfailkan usul pemula ('lampiran 1') bagi perintah bahawa award sebahagian tersebut dikembalikan ke tribunal timbang tara untuk pertimbangan semula dan memperoleh kebenaran untuk menyerahkan lampiran 1 di luar bidang kuasa. Responden memfailkan satu permohonan dalam lampiran 9 untuk mengetepikan lampiran 1, kebenaran penyerahan di luar bidang kuasa dan penyerahan lampiran 1. Responden membantah bidang kuasa Mahkamah Tinggi di bawah A. 69 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') atas alasan bahawa 'tempat bersidang timbang tara bukan lagi Kuala Lumpur'. Mahkamah Tinggi memutuskan memihak kepada responden dan memutuskan bahawa ia tiada bidang kuasa terhadap award sebahagian tersebut kerana persidangan timbang tara bukan lagi Kuala Lumpur kerana telah berpindah ke London. Adalah diputuskan bahawa undang-undang pemulihan, iaitu undang-undang yang mentadbir prosiding timbang tara, adalah undang-undang England dan oleh itu, apa-apa cabaran terhadap award sebahagian itu wajar difailkan di mahkamah yang kompeten di England. Perayu merayu kepada Mahkamah Rayuan. Pada masa yang sama, perayu memohon deklarasi di bawah Indian Arbitration and Conciliation Act 1996 di Mahkamah Tinggi Delhi bahawa tempat persidangan timbang tara adalah Kuala Lumpur ('OMP'). Responden membantah permohonan tersebut tetapi ditolak oleh Mahkamah Tinggi Delhi dan dengan itu, responden memfailkan

'Special Leave Petition' ('SLP') ke Mahkamah Agung India. Mahkamah Agung India membenarkan rayuan responden yang menjurus kepada responden mengambil langkah-langkah menghidupkan prosiding London dengan memohon deklarasi bahawa tempat persidangan tetap timbang tara adalah London. Sebaliknya perayu memulakan injunksi anti-tindakan terhadap responden di Mahkamah Tinggi Delhi untuk menghalang responden daripada meneruskan prosiding London. Walau bagaimanapun, Mahkamah Tinggi Delhi mengisytiharkan, antara lain, bahawa sidang juridikal telah pun dikemukakan sebagan isu di Mahkamah Agung oleh responden dan keputusan Mahkamah Agung adalah *res judicata* antara pihak-pihak. Mahkamah Tinggi Delhi mengeluarkan injunksi anti-tindakan terhadap responden dan oleh itu, responden merayu kepada sidang penuh. Mahkamah Rayuan Malaysia memutuskan bahawa per. 34.12 PSC hanya berkaitan dengan 'tempat' dan bahawa dengan pemindahan tempat ke London, undang-undang Inggeris yang boleh diguna pakai. Walau bagaimanapun, Mahkamah Rayuan tidak bersetuju dengan Mahkamah Tinggi berkaitan isu 'sidang', memutuskan bahawa sidang timbang tara diputuskan oleh undang-undang yang mentadbir perjanjian timbang tara dan dengan itu memutuskan bahawa London adalah sidang juridikal kerana undang-undang Inggeris dipilih sebagai undang-undang timbang tara. Tidak berpuas hati, perayu memohon kebenaran untuk merayu ke Mahkamah Persekutuan atas persoalan undang-undang berikut: (i) sama ada sidang juridikal timbang tara adalah persoalan undang-undang bergantung kepada kontrak dan hal keadaan sekeliling, manakala tempat timbang tara bersidang adalah perkara kemudahan geografi bagi pihak-pihak; (ii) apabila kontrak memperuntukkan tempat timbang tara, dan juga memperuntukkan prosedur pindaan yang spesifik untuk mengubah mana-mana klausanya, sama ada pemindahan sah tempat boleh dibuat selain daripada menurut prosedur pindaan yang dinyatakan; dan (iii) sama ada responden terhalang oleh estoppel dan *res judicata* berikutan penghakiman Mahkamah Agung India daripada menghujahkan bahawa sidang juridikal telah berpindah dari Kuala Lumpur.

Diputuskan (menolak rayuan dengan kos)
Oleh Arifin Zakaria KHN menyampaikan penghakiman mahkamah:

(1) Sidang timbang tara menentukan undang-undang pemulihan yang mentadbir prosiding timbang tara. Sidang dirujuk sebagai sidang dari segi undang-undang dan bukan sidang dari segi geografi. Ia adalah sidang kekal atau tetap yang hanya boleh ditukar dengan persetujuan pihak-pihak kepada timbang tara dan mesti dibezakan dari tempat secara fizikal atau geografi di mana timbang tara diadakan. Dalam kes tempat timbang tara, ia boleh dipindahkan dari satu tempat ke tempat yang lain tanpa menjejaskan sidang timbang tara dari segi undang-undang.

(2) Terma yang digunakan dalam klausa timbang tara dalam kes ini adalah 'venue' dan bukan 'seat'. Tempat timbang tara seperti dalam per. 34.12 adalah Kuala Lumpur, Malaysia, sementara undang-undang yang

A mentadbir perjanjian timbang tara adalah undang-undang Inggeris. Tanpa apa-apa peruntukan bagi sidang timbang tara, Kuala Lumpur yang dinamakan sebagai tempat timbang tara, boleh dianggap sebagai sidang timbang tara. Jika perkataan 'venue' dalam per. 34.12 adalah rujukan kepada sidang dari segi geografi atau fizikal semata-mata, ia mungkin
B tidak perlu dimasukkan dalam perjanjian kerana sidang dari segi geografi boleh diubah pada bila-bila masa mengikut kesenangan pihak-pihak. Oleh sebab pihak-pihak menamakan Kuala Lumpur secara jelas sebagai 'venue', perkataan 'venue' mesti ditafsirkan membawa maksud 'seat'.

(3) Perkataan 'venue' atau 'seat' juga biasa digunakan silih berganti dalam
C timbang tara antarabangsa. Dalam kes ini, pada permulaan prosiding timbang tara, Kuala Lumpur diterima secara umum sebagai sidang timbang tara. Ini, ditambah dengan memfailkan permohonan untuk mengetepikan award sebahagian di Mahkamah Tinggi Kuala Lumpur oleh perayu, menunjukkan bahawa perayu menerima Kuala Lumpur
D sebagai sidang timbang tara. Adalah undang-undang matan bahawa cabaran sedemikian hanya boleh dibuat dalam bidang kuasa sidang timbang tara. Dengan itu, perkataan 'venue' dalam per. 34.12 sepatutnya, atas pentafsiran yang sewajarnya, ditafsirkan sebagai bermaksud sidang timbang tara, dan bukan tempat timbang tara dari segi
E geografi.

(4) Selanjutnya, pertukaran dari segi sidang timbang tara adalah dalam jangkaan pihak-pihak seperti yang digambarkan dalam per. 34.12 PSC. Perkataan-perkataan dalam klausa tersebut jelas memberikan pihak-
F pihak kelenturan untuk mengubah atau memindahkan 'venue' timbang tara ke suatu tempat selain dari Kuala Lumpur, dengan persetujuan pihak-pihak. Oleh sebab perintah yang dibuat di London adalah perintah persetujuan, tribunal timbang tara tidak mungkin akan merekodkan sedemikian tanpa persetujuan pihak-pihak.

(5) Perkara 35.2 PSC tidak mentadbir perjanjian timbang tara, kerana
G perjanjian timbang tara adalah perjanjian yang berbeza dan berasingan daripada perjanjian dasar. Ini diperkukuhkan lagi oleh fakta bahawa menurut per. 34.12 PSC, perjanjian timbang tara ditadbir oleh undang-undang England. Di bawah s. 7, English Arbitration Act 1996, perjanjian timbang tara perlu dipertimbangkan sebagai perjanjian yang
H berbeza daripada perjanjian dasar. Dengan itu, perjanjian timbang tara yang terkandung dalam per. 34 PSC mesti dipertimbangkan sebagai perjanjian yang berasingan dan berbeza daripada perjanjian dasar. Oleh demikian, per. 35.2 PSC tidak terpakai kepada perjanjian timbang tara.

(6) Terma 'kecuali jika pihak-pihak menyetujui sebaliknya' dalam
I per. 34.12 secara khusus memberikan pihak-pihak hak untuk mengubah sidang juridikal timbang tara menurut peruntukan tersebut. Oleh itu, hujahan bahawa persetujuan 'kesemua pihak' seperti yang dinyatakan oleh per. 35.2 diperlukan untuk mengubah sidang timbang tara tidak

boleh dikekalkan kerana per. 34.12 secara khusus menggunakan terma 'pihak-pihak' dan bukan 'kesemua pihak' yang terdapat dalam per. 35.2 PSC. Selanjutnya, terma 'pihak-pihak' dalam per. 34.12 merujuk kepada pihak-pihak kepada timbang tara dan bukan 'kesemua pihak' kepada PSC. Pihak-pihak tidak mungkin meniatkan bahawa apa-apa perubahan dalam sidang juridikal timbang tara memerlukan persetujuan 'kesemua pihak' yang mungkin bukan pihak kepada timbang tara. Atas alasan-alasan tersebut, terma 'pihak-pihak' dalam per. 34.12 jelas diarahkan kepada pihak-pihak kepada timbang tara berbanding pihak-pihak kepada PSC. Dalam hal keadaan tersebut, per. 35.2 tiada aplikasi kepada perjanjian timbang tara yang ditadbir secara khusus oleh per. 34 PSC.

(7) Adalah undang-undang matan bahawa keputusan mahkamah tanpa bidang kuasa yang diperlukan tidak membangkitkan *res judicata*. Setelah memutuskan Mahkamah Tinggi Delhi tiada bidang kuasa untuk mempertimbangkan petisyen perayu (responden dalam SLP), Mahkamah Agung India tidak lagi perlu menyelidiki isu sidang timbang tara. Arahan dan/atau pemerhatian yang dibuat oleh Mahkamah Agung India berkenaan isu tersebut tidak lagi mempunyai kesan dan tidak mempunyai kesan menghalang responden daripada menggerakkan semula isu tersebut di mahkamah Malaysia. Keputusan Mahkamah Agung India melampaui isu bidang kuasa perlu dipertimbangkan sebagai *obiter dicta* semata-mata tanpa kesan mengikat atas pihak-pihak. Oleh itu, pemerhatian Mahkamah Agung India tidak boleh diplidkan sebagai *res judicata* menghalang responden daripada membangkitkannya di mahkamah Malaysia.

(8) Adalah undang-undang matan bahawa untuk isu estoppel terpakai terhadap sesuatu pihak, keputusan atas isu tersebut perlu menjadi 'langkah perlu' kepada keputusan tersebut atau 'perkara yang perlu diputuskan, dan yang sebenarnya telah diputuskan, sebagai asas keputusan tersebut', iaitu, isu dalam persoalan sepatutnya telah dilitigasikan antara pihak-pihak dan adalah penting kepada keputusan mahkamah. Dalam kes ini, isu sidang timbang tara tidak boleh terangkum dalam definisi tersebut, kerana isu di Mahkamah Agung India adalah sama ada Mahkamah Tinggi Delhi mempunyai bidang kuasa untuk mempertimbangkan OMP, yang dijawab secara negatif. Oleh itu, responden tidak dihalang oleh isu estoppel daripada melitigasinya di mahkamah Malaysia.

Case(s) referred to:

A v. B [2007] 1 Lloyd's LR 237 ***(refd)***

C v. D [2007] EWCA Civ 1282 ***(refd)***

C v. D [2007] EWHC 1541 ***(refd)***

Carl Zeiss Stiftung v. Rayner & Keeler Ltd (No. 2) [1967] 1 AC 853 ***(refd)***

Channel Tunnel Groups Ltd and Another v. Balfour Beatty Construction Ltd and Others [1993] AC 334 ***(refd)***

Golden Vale Golf Range & Country Club Sdn Bhd v. Hong Huat Enterprise Sdn Bhd [2008] 6 CLJ 31 CA ***(refd)***

A *Hasham Abbas Sayyad v. Usman Abbas Sayyad and Others (2007) 2 SCC 355* ***(refd)***
Heyman v. Darwins Ltd [1942] AC 356 ***(refd)***
Lombard Commodities Ltd v. Alami Vegetable Oil Products Sdn Bhd [2010] 1 CLJ 137 FC ***(refd)***
Muthavalli of Sha Madhari Diwan Wakf, SJ Syed Zakrudeen and Another v. Syed Zindasha and Another (2009) 12 SCC 280 ***(refd)***
B *Naviera Amazonica Peruana SA v. Compania Internacional de Seguros del Peru [1998] 1 Lloyd's Rep 116* ***(refd)***
Pawan Kumar Gupta v. Rochiram Nagdeo (1999) 4 SCC 243 ***(refd)***
Shashoua and Others v. Sharma [2009] EWHC 957 (Comm) ***(refd)***
Sri Athmanathaswami Devasthanam v. K Gopalaswami Ayyangar (1964) 3 SCR 763 ***(refd)***
C *Syed Mohd Salie Labbai (Dead) by LRs and Others v. Mohd Hanifa (Dead) by LRs and Others (1976) 4 SCC 780* ***(refd)***
The Government of India v. Cairn Energy India Pty Ltd & Anor [2012] 3 CLJ 423 FC ***(refd)***
Union of India v. McDonnell Douglas Corp [1993] 2 Lloyd's Rep 48 ***(refd)***

D **Legislation referred to:**
Courts of Judicature Act 1964, ss. 23(1)(a), (c), 78(1)
Rules of the High Court 1980, O. 69

Arbitration Act 1996 [UK], ss. 3, 7
Arbitration and Conciliation Act 1996 [Ind], s. 9

E **Other source(s) referred to:**
P Ramanatha Aiyar, '*The Law Lexicon*', 2nd edn Reprint, 2010, LexisNexis, pp 656-657
Redfern And Hunter on International Arbitration, 5th edn, 2009, p 180

For the appellant - Cyrus Das, Saranjit Singh, Lam Ko Luen & Hoe Mei Lei; M/s Saranjit
F *Singh*
For the respondent - Khoo Guan Huat, Ivan Loo, Shannon Rajan, Denise Cheong & Siew Suet Mey; M/s Skrine

[Editor's note: For the Court of Appeal judgment, please see The Government of India v. Petrocon India Limited [2012] 1 LNS 974 (affirmed).]

G *Reported by S Barathi*

JUDGMENT

Arifin Zakaria CJ:

H ### Introduction

[1] This is an appeal by the appellant against the decision of the Court of Appeal dated 8 August 2012. Leave to appeal was granted by this court on 8 April 2014. The questions of law posed to us are as follows:

I (i) whether the juridical seat of arbitration is a question of law dependent on the contract and its surrounding circumstances, whereas the venue of the arbitration is a matter of geographical convenience of the parties?

(ii) where a contract provides for a place of arbitration, and also provides for a specific amendment procedure to change any of its clauses, whether a legal change in the venue can be brought about other than in accordance with the prescribed amendment procedure?; and

(iii) whether the Respondent is precluded by estoppel and *res judicata* following the judgment of the Indian Supreme Court from contending that the juridical seat has shifted away from Kuala Lumpur?

Background Facts

[2] The pertinent facts may be briefly stated as follows: the Government of India (the appellant) and Petrocon India Limited (the respondent) were parties to a production sharing contract dated 28 October 1994 (the PSC). There were three other parties to the PSC namely, The Oil & Natural Gas Corporation Limited (ONGC), Cairn Energy India Private Limited (Cairn Energy) and Ravva Oil (Singapore) Pte Ltd (Ravva Oil). The PSC was in respect of the development of petroleum resources in an area in India known as the Ravva Oil and Gas Field.

[3] Disputes arose between the appellant and the respondent in respect of the PSC and pursuant to the terms of the PSC, the appellant issued three notices to arbitrate dated 9 September 2001, 19 August 2002, and 30 July 2003 to the respondent.

[4] The arbitral tribunal had on 28 March 2003, fixed a tentative preliminary meeting of the arbitration to be held in Kuala Lumpur in the week beginning 19 May 2003 but due to the outbreak of SARS epidemic, the arbitral tribunal shifted the venue of its sittings to Amsterdam. On 30 June 2003, the preliminary meeting of the arbitration was held in Amsterdam and directions in respect of the conduct of the arbitration were given. Subsequent hearings and proceedings were then held in London on 14 November 2003 (Arbitration Case No. 1) and 15 November 2003 (Arbitration Case No. 3). The appellant's application for interim relief was fixed for hearing on 26 September 2003 in London.

[5] By a consent order dated 15 November 2003 made in London, the arbitrators recorded that the seat of the arbitration is shifted to London. A further case management of the arbitration was fixed on 12 December 2003 in London. An arbitral tribunal was constituted and arbitration proceedings commenced. Upon hearing the parties, the arbitral tribunal published their partial award dated 31 March 2005.

[6] On 10 May 2005, the appellant filed the originating motion (encl. 1) for an order that part of the partial award dated 31 March 2005 be set aside or alternatively for an order the relevant part of the award be remitted to the arbitral tribunal for reconsideration. On 27 September 2005, the appellant obtained leave to serve encl. 1 out of jurisdiction.

[7] On 1 June 2006, the respondent filed an application in encl. 9 to set aside encl. 1, leave to serve out of jurisdiction, and service of encl. 1. The respondent objected to the jurisdiction of the High Court under O. 69 of the Rules of High Court 1980 (RHC 1980) on the ground that 'the seat of the arbitration was no longer Kuala Lumpur'.

High Court

[8] On 5 August 2009, the High Court ruled in favour of the respondent and held that it had no jurisdiction over the partial award because the seat of arbitration was no longer Kuala Lumpur. The High Court held that the seat of arbitration has been shifted to London from Kuala Lumpur. The High Court decided that the curial law that is the law governing the arbitration proceedings would be the laws of England that is, the Arbitration Act 1996. On that basis, the High Court held that any challenge to the partial award ought to be filed before the competent courts in England. The High Court also held that by virtue of s. 23 of the Courts of Judicature Act 1964 (CJA), it did not have jurisdiction over the matter as it did not fall within either s. 23(1)(a) or (c) of the CJA.

[9] The High Court further ruled that leave to serve encl. 1 out of jurisdiction is permissible only if the arbitration to which the originating motion relates is to be, or has been held within the jurisdiction of the court. The High Court stated that there was no arbitration proceedings held in Kuala Lumpur, and on that ground leave was denied. On that premise, the High Court set aside the order dated 29 February 2005, and allowed the respondent's application with costs.

[10] The brief grounds of decision of the High Court is reproduced below:

> I have considered the Applicant's and Respondent's submission as presented above and the parties' oral submission and at the end of the hearing I made the following decision:
>
> (i) That based on the Consent Order of 15.11.2003, the juridical seat of the arbitration has as a matter of fact been shifted to London from Kuala Lumpur;
>
> (ii) As the juridical seat has been shifted to London from Kuala Lumpur by virtue of Section 23 CJA this Court does not have jurisdiction over the Partial Award sought to be impugned by the Applicant/Respondent; and
>
> (iii) By virtue of Order 69 rule 5 RHC 1980, the order dated 29/2/2005 ought to be set aside as the arbitration proceedings were held in London and not in Kuala Lumpur. Therefore even if it is argued that the seat of arbitration remains in Kuala Lumpur, Applicant would not be able to serve the Originating Motion out of jurisdiction as no arbitration proceedings have been held in Malaysia. For the above reasons, and other reasons submitted by the Respondent, the Respondents (*sic*) application as per Enclosure (9) is allowed with costs.

[11] The appellant then appealed to the Court of Appeal. Simultaneously, proceedings were also conducted in India where the appellant filed the Original Miscellaneous Petition No. 255 of 2006 (OMP) under s. 9 of the Indian Arbitration and Conciliation Act 1996 before the Delhi High Court seeking a declaration that the seat of arbitration is Kuala Lumpur. The respondent objected to the maintainability of the action, arguing that the Indian courts do not have jurisdiction. The Delhi High Court dismissed the respondent's objection.

[12] The respondent then filed a Special Leave Petition (SLP) by way of appeal to the Supreme Court of India to challenge the Delhi High Court's order. At about the same period, the respondent also filed a claim before the Commercial Court in London to determine the question of the juridical seat of arbitration.

[13] On 6 September 2010, the Supreme Court of India appraised the pending appeal by the appellant in Kuala Lumpur and the action instituted by the respondent in London, both on the issue of the juridical seat. Both parties agreed to stay the prosecution of these proceedings until the disposal of the SLP at the Supreme Court of India. The appellant wrote to the Court of Appeal, Malaysia on 23 March 2011 to withhold the hearing of the Malaysian appeal. Accordingly, the parties stayed the appeal at the Malaysian Court of Appeal pending the outcome of the juridical seat issue at the Supreme Court of India.

[14] On 11 May 2011, the Supreme Court of India granted leave to appeal in the SLP and allowed the respondent's Civil Appeal No. 4269 of 2011. Subsequent to the Indian Supreme Court's decision, the respondent took steps to revive the London proceedings by seeking a declaration that the permanent seat of arbitration is London. The appellant brought an anti-suit injunction against the respondent in the Delhi High Court to restrain the respondent from continuing with the London proceedings as the Indian Supreme Court had confirmed that the seat of arbitration remains to be Kuala Lumpur.

[15] On 5 March 2012, the Delhi High Court declared, *inter alia*, that the juridical seat was put in issue before the Supreme Court by the respondent and the conclusion of the Supreme Court constituted *res judicata* between the parties. The Delhi High Court issued the anti-suit injunction against the respondent. The respondent appealed to a full bench on 23 March 2012.

Court Of Appeal

[16] While the court proceedings outside Malaysia continued, on 8 October 2012, the Malaysian Court of Appeal affirmed the decision of the High Court but on different grounds. The Court of Appeal held that cl. 34.12 of the PSC was concerned only with "venue" and that with the change of venue to London, English law was the governing law. The Court of Appeal

A however disagreed with the High Court on the issue of "seat", holding that the seat of arbitration is determined by the governing law of the arbitration agreement. The Court of Appeal accordingly concluded that London is the juridical seat because English law was chosen as the law of the arbitration; part of the brief reasons relied upon by the Court of Appeal are for ease of
B reference reproduced below:

> 17. As mentioned above, Article 34.12 provided that "The venue of sole expert, conciliation or arbitration proceedings pursuant to this Article, unless the Parties otherwise agree, shall be in Kuala Lumpur Malaysia". The term "venue of arbitration proceedings" is a term that ordinarily
C refers to the geographical or physical seat of arbitration which can be moved to other locations as may suit the convenience of the parties and the arbitral tribunal, and distinct from the juridical seat of arbitration from which flows the *lex arbitri* or procedural or curial law of the arbitration.
>
> 18. Given the stature that the party to the production sharing contract is the Government of India and that it was executed by the President of
D India, the use of the term "venue of arbitration proceedings" instead of the "seat of arbitration" in the production sharing contract, can only be the expression of a conscious and precise intention that Kuala Lumpur is merely the geographical or physical seat of arbitration which may be changed by agreement of the parties at the beginning or in the course of
E arbitration. It is clear Kuala Lumpur had not been chosen as the seat of arbitration.
>
> 19. By contrast the Consent Order of 15-11-2003 recorded by the parties before the arbitral tribunal, that "By consent of parties seat of arbitration is shifted to London." We hold, in light of Article 35.1, the Consent Order can have no effect of shifting the juridical seat of arbitration. The
F Consent Order however is consistent with it being a record of the agreement of the parties pursuant to Article 34.12 to formally move the venue of arbitration to London until further agreement.
>
> 20. In *Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd* [1993] AC 334 HL, [1993] 1 All ER 664; [1993] 2 WLR 262, it was held by the House
G of Lords that the presumption in favour of the law of the "seat" was "irresistible" in the absence of an explicit choice of some other law. In our considered opinion, it is equally true that the presumption in favour of the choice of law is irresistible in the absence of some other choice of seat of arbitration. Hence, if there was no choice of some other seat, it must be presumed that the country of the governing law of the arbitration
H agreement, in this case England, determines the seat of arbitration.
>
> 21. In conclusion, we find no error in the decision of the learned Judge of the High Court to warrant intervention by this Court. We dismiss the appeal with costs.

I **[17]** As a result, the parties were put in a bind following the Indian Supreme Court's decision and subsequent Delhi High Court's decision which declared Kuala Lumpur as the seat of the arbitration whereas the Malaysian Court of Appeal held that the seat had shifted permanently to London.

[18] On 28 January 2013, by consent of both parties, the respondent's appeal at the Delhi High Court was disposed of on agreed terms. The respondent also withdrew the London proceeding on 7 May 2013 and agreed to the binding decision of the Indian Supreme Court.

Federal Court

[19] The appellant applied for leave to appeal to the Federal Court and leave was granted on 8 April 2014 on the three questions of law set out earlier.

Question 1

Whether The Juridical Seat Of Arbitration Is A Question Of Law Dependent On The Contract And Its Surrounding Circumstances, Whereas The Venue Of The Arbitration Is A Matter Of Geographical Convenience Of The Parties?

Parties' Submission

[20] The appellant asserted that the seat of the arbitration is Kuala Lumpur and remained to be Kuala Lumpur and that the partial award should be deemed to have been made in Kuala Lumpur. On the application of the English law, the appellant contended that the English Arbitration Act 1996 did not apply for the purpose of determining whether the seat of arbitration had shifted to London from Kuala Lumpur. The appellant contended that the fact that the Arbitration Agreement was governed by English law was immaterial as far as the issue of seat is concerned. The appellant's contention was premised on the following:

(a) as Kuala Lumpur has been expressly designated as the juridical seat of the arbitration, the curial law follows the seat; and

(b) since the juridical seat has been designated expressly in the agreement itself by the parties, the question of determining the seat under s. 3 of the English Arbitration Act 1996 did not arise. The role of the arbitral tribunal to determine the juridical seat would only arise when parties failed to designate a juridical seat in the arbitration agreement itself, which the appellant argued was not the case here.

[21] The appellant further submitted that although a few of the arbitration hearings were held in London and the partial award itself was signed in London, the seat of the arbitration continued to be Kuala Lumpur. The appellant further added that the partial award made in London ought to be deemed to have been made in Kuala Lumpur as it is the juridical seat, and Kuala Lumpur remained the juridical seat as it was specifically and expressly designated in the PSC. The change in the venue from Kuala Lumpur to London was, according to the appellant, merely for the sake of convenience due to the SARS outbreak, therefore, what was clearly intended and agreed to, is a shift of the physical seat as opposed to the legal seat.

[22] The appellant further submitted that the legal seat should be constant regardless of where the arbitration may be conducted and that the legal seat is a concept independent of the place where the hearing or part of the arbitral proceedings occurred, which may not be the same.

[23] The respondent's main argument before the High Court was that the High Court lacks the jurisdiction to hear the appellant's originating motion to set aside the partial award as the seat of arbitration has shifted from Kuala Lumpur to London. The respondent submitted that if the partial award that the appellant is seeking to set aside had been made in Kuala Lumpur, in that the arbitration to which it relates was held in Kuala Lumpur, then the court can be said to have jurisdiction to hear the appellant's application either because the cause of action arose in Kuala Lumpur or because the facts on which the proceedings are based (that is the arbitration) exist or occurred within the local jurisdiction of the court.

[24] The respondent further argued that in the alternative, if the seat of the arbitration is not within the territorial jurisdiction of the court, and no other facts on which these proceedings are based exist or are alleged to have occurred within the territorial jurisdiction of the court, then the court would not have the jurisdiction to adjudicate on a matter in relation to that arbitration. Further, the respondent argued that the seat of the arbitration was moved to London by consent of the parties and therefore the High Court of Malaya no longer has jurisdiction over the arbitration proceedings and it follows that the court will have no jurisdiction over the appellant's application to set aside the partial award.

The Seat of Arbitration

[25] The contentious issue before us is where the seat of arbitration is located? Is it in Kuala Lumpur or London? In determining the seat of arbitration, one needs to construe the relevant clauses of the PSC. For this purpose, we reproduce below the salient clauses of the PSC for ease of reference:

ARTICLE 33

APPLICABLE LAW AND LANGUAGE OF THE CONTRACT

33.1 Indian Law to Govern

Subject to the provisions of Article 34.12 this Contract shall be governed and interpreted in accordance with the laws of India.

33.2 Laws of India Not to be Contravened

Subject to Article 17.1 nothing in this Contract shall entitle the Contractor to exercise the rights, privileges and powers conferred upon it by this Contract in a manner which will contravene the laws of India.

ARTICLE 34

SOLE EXPERT, CONCILIATION AND ARBITRATION

34.1 Parties to Use Best Efforts to Settle Disputes

The Parties shall use their best efforts to settle amicably all disputes, differences or claims arising out of or in connection with any of the terms and conditions of this Contract or concerning the interpretation or performance thereof.

34.2 References to Sole Expert

Matters which, by the terms of this contract, the Parties have agreed to refer to a sole expert and any other matters which the Parties may agree to so refer, shall be referred to an independent and impartial person of international standing with relevant qualifications and experience appointed by agreement between the Parties. Any sole expert appointed shall be acting as an expert and not as an arbitrator and the decision of the sole expert on matters referred to him shall be final and binding on the Parties and not subject to arbitration. If the Parties are unable to agree on a sole expert, the matter may be referred to arbitration.

34.3 Unresolved Disputes

Subject to the provisions of this Contract, the Parties hereby agree that any matter, unresolved dispute, difference or claim which cannot be agreed or settled amicably within twenty one (21) days may be submitted to a sole expert (where Article 34.2 applies) or otherwise to an arbitral tribunal for final decision as hereinafter provided.

...

34.8 Decision of Arbitral Tribunal to be Binding

The decision of the arbitral tribunal, and, in the case of difference among the arbitrators, the decision of the majority, shall be final and binding upon the Parties.

34.9 UNCITRAL Rules to Apply

Arbitration proceedings shall be conducted in accordance with the UNCITRAL Model Law on International Commercial Arbitration of 1985 except that in the event of any conflict between these rules and the provisions of this Article 34, the provisions of this Article 34 shall govern.

...

34.12 Venue and Law of Arbitration Agreement

The venue of sole expert, conciliation or arbitration proceedings pursuant to this Article, unless the Parties otherwise agree, shall be Kuala Lumpur, Malaysia, and shall be conducted in the English language. Insofar as practicable, the Parties shall continue to implement the terms of this Contract notwithstanding the initiation of arbitral proceedings and any pending claim or dispute. Notwithstanding the provisions of Article 33.1, **the arbitration agreement contained in this Article 34 shall be governed by the laws of England**.

...

ARTICLE 35

ENTIRE AGREEMENT, AMENDMENTS, WAIVER AND MISCELLANEOUS.

35.1 Supersedes Prior Agreements

This Contract supersedes and replaces any previous agreement or understanding between the Parties, whether oral or written, on the subject matter hereof, prior to the Effective Date of this Contract.

35.2 Amendment

This Contract shall not be amended, modified, varied or supplemented in any respect except by an instrument in writing **signed by all the Parties**, which shall state the date upon which the amendment or modification shall become effective. (emphasis added)

[26] The PSC expressly stated that the governing law of the PSC is the Indian law. By virtue of art. 34.12, the venue of the arbitration is stated as Kuala Lumpur, Malaysia and that the governing law for the arbitration agreement is the English law. The Arbitration proceedings clause stated that it "shall be conducted in accordance with the UNCITRAL Model Law on International Commercial Arbitration of 1985…".

[27] The High Court treated the 'venue of arbitration' as the 'seat of arbitration' and held that the 'seat of arbitration' had shifted from Kuala Lumpur to London. While the Court of Appeal came to its decision on the premise that the venue is merely a matter of geographical convenience for the parties and that the seat of arbitration is determined by the law governing the arbitration agreement, which is English law.

[28] It is common ground that parties intended for the dispute to be resolved by way of international arbitration. Arbitration is governed by the law of the place which is the seat of arbitration, this is settled both in theory and practice of international arbitration. (see *Redfern And Hunter on International Arbitration*, 5th edn, 2009, at p. 180.) This is based on the 1923 Geneva Protocol, the precursor to the New York Convention which states that:

> The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.

[29] The New York Convention of 1958 which replaces the Geneva Protocol 1923 maintains the reference to the law of the country where the arbitration took place. Under the UNCITRAL Model Law on International Commercial Arbitration of 1985, the territorial link between the place of arbitration and the law governing that arbitration is maintained.

The "Seat", "Place", "Venue" Or "Forum"

[30] The term used in the arbitration clause in the present case is "venue" rather than "seat". In international arbitrations, the words often used are "place of arbitration", "seat of arbitration" and "forum". This brings us to the following questions. Firstly, whether there is a fixed terminology in reference to the seat of arbitration. Secondly, whether there was a "seat" of arbitration expressly selected by the parties. Thirdly, whether the terminology "venue" has the same meaning as "seat".

[31] The Federal Court in *The Government of India v. Cairn Energy India Pty Ltd & Anor* [2012] 3 CLJ 423 cited with approval the case of *C v. D* [2007] EWCA Civ 1282 where Longmore LJ observed:

> It follows from this that a choice of seat for the arbitration must be a choice of forum for remedies seeking to attack the award. As the judge said in para. 27 of his judgment, as a matter of construction of the insurance contract with its reference to the English statutory law of arbitration, the parties incorporated the framework of the 1996 Act. He added that their agreement on the seat and the "curial law" necessarily meant that any challenges to any award had to be only those permitted by that Act. In so holding he was following the decisions of Colman J in *A v. B* [2006] EWHC 2006 (Comm), [2007] 1 All ER (Comm) 591, [2007] 1 Lloyd's Rep 237 and *A v. B (No. 2)* [2007] EWHC 54 (Comm), [2007] 1 All ER (Comm) 633, [2007] 1 Lloyd's Rep 358 in the first of which that learned judge said (para. 111):
>
> > … an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the existence or scope of the arbitrator's jurisdiction or as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of the arbitration.
> >
> > That is, in my view, a correct statement of the law …

[32] On the effect of the choice of seat of arbitration, the Federal Court stated:

> It is therefore clear that the English Court of Appeal clearly sets out that the curial law ought to be that of the seat of arbitration. As stated above, our courts have adopted a similar position. Thus, in this case as Kuala Lumpur was selected as the juridical seat of arbitration, the curial law is the laws of Malaysia and we so hold. And we would add that it is vital for parties to follow the mandatory rules of the seat of arbitration since the application of such mandatory procedural rules (curial law) of the seat will remain subject to the jurisdiction and control of the courts of the seat of the arbitration including when considering applications to set aside awards. We are therefore not persuaded that the decisions of the Indian Supreme Court should be applied.

[33] Thus, the seat of arbitration will determine the curial law that will govern the arbitration proceeding. The seat here refers to the legal seat rather than the geographical seat. It is a permanent or fixed seat which can only be changed by consent of parties to the arbitration and this must be distinguished from the physical or geographical place where the arbitration was held. In the case of place of arbitration it can be shifted from place to place without affecting the legal seat of the arbitration.

[34] In *Naviera Amazonica Peruana SA v. Compania Internacional de Seguros del Peru* [1998] Vol. 1 Lloyd's Rep 116 (CA), Kerr LJ explained the distinction between the seat of arbitration and the geographically convenient place for holding the hearings in the following words:

> The preceding discussion has been on the basis that there is only one "place" of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of reference or the minutes of proceedings or in some other way as the place or "seat" of the arbitration. This does not mean, however, that the arbitral tribunal must hold all its meetings or hearings at the place of arbitration. International commercial arbitration often involves people of many nationalities, from many different countries. In these circumstances, it is by no means unusual for an arbitral tribunal to hold meetings – or even hearings – in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses ...

[35] In *Channel Tunnel Groups Ltd and Another v. Balfour Beatty Construction Ltd and Others* [1993] AC 334, Lord Mustill held at pp. 357-358:

> Certainly there may sometimes be an express choice of a curial law which is not the law of the place where the arbitration is to be held: but in the absence of an explicit choice of this kind, or at least some very strong pointer in the agreement to show that such a choice was intended, the inference that the parties when contracting to arbitrate in a particular place consented to having the arbitral process governed by the law of that place is irresistible.

We can therefore conclude that there is a strong presumption that the place of arbitration named in the agreement will constitute the juridical seat. (See also *Shashoua and Others v. Sharma* [2009] EWHC 957 (Comm)).

[36] In the present case the venue of arbitration as stated in cl. 34.12 being Kuala Lumpur, Malaysia, while the law governing arbitration agreement is English law. There is no provision for seat of arbitration as such. In the circumstances, could Kuala Lumpur which is named as the venue of arbitration be deemed to be the seat of the arbitration? We are of the view that there is a strong support for that proposition for the following reasons. Firstly, if the word "venue" in cl. 34.12 is merely a reference to the geographical or physical seat as held by the Court of Appeal, it would not

have been necessary to have it inserted in the agreement because the geographical seat may be changed at any time at the convenience of the parties. Since the parties had expressly named Kuala Lumpur as the "venue" we are inclined to the view that the word "venue" in the present context must be construed to mean "seat".

[37] Further, as stated earlier the word "venue" or "seat" is often used interchangeably in international arbitrations. In the present case, it was common ground that venue of the arbitration was first moved to Amsterdam from Kuala Lumpur due to the outbreak of SARS epidemic in Kuala Lumpur. Subsequently the hearings were shifted to London, culminating in the consent order of 15 November 2003, which shifted the seat of the arbitration to London. Therefore, at the start of the arbitration proceedings, Kuala Lumpur was commonly accepted as the seat of arbitration. This, couple with the filing of the application to set aside the partial award in the Kuala Lumpur High Court by the appellant, go to show that the appellant had accepted Kuala Lumpur as the seat of arbitration. It is trite law that such a challenge can only be made in the jurisdiction which is the seat of arbitration. (See *Lombard Commodities Ltd v. Alami Vegetable Oil Products Sdn Bhd* [2010] 1 CLJ 137 (FC); *A v. B* [2007] 1 Lloyd's LR 237; *C v. D* [2007] EWHC 1541). On the above premise, we accordingly hold that in the circumstances of this case, the word "venue" in art. 34.12 should, on its proper interpretation, be construed to mean seat of arbitration, as opposed to the geographical place for arbitration.

[38] The next question that follows is whether the seat of arbitration had been shifted to London by reason of the consent order recorded by the arbitration tribunal sitting in London on 14 November 2003 and 15 November 2003. It is the contention of the appellant that it did not authorise the arbitral tribunal to shift the seat as recorded in the consent order, if at all it was just an agreement to shift the geographical place for the arbitration. The respondent on the other hand contended that the order was a consent order, therefore, the arbitral tribunal would not have recorded it as such without the consent of the parties. Again, we are inclined to agree with the submission of the respondent as a change in the seat of the arbitration is something which is within the contemplation of parties as reflected in art. 34.12 of the PSC, the relevant part of which reads:

> The venue of sole expert, conciliation or arbitration proceedings pursuant to this Article, **unless the Parties otherwise agree**, shall be Kuala Lumpur, Malaysia … (emphasis added)

The underlined words clearly give the parties the flexibility to change or shift the "venue" of the arbitration to a place other than Kuala Lumpur. However, the change can only take place with the concurrence of parties.

[39] In light of the above, we would answer the first question in the following manner; based on art. 34.12 and the surrounding circumstances, we hold that the word "venue" means the juridical seat of arbitration, not merely the geographical place of arbitration.

Question 2

Where A Contract Provides For A Place Of Arbitration, And Also Provides For A Specific Amendment Procedure To Change Any Of Its Clauses, Whether A Legal Change In The Venue Can Be Brought About Other Than In Accordance With The Prescribed Amendment Procedure?"

[40] The next issue is whether the change in the "venue" of arbitration need to have the concurrence of all the parties to the PSC as stipulated in art. 35.2 of the PSC. Having considered the submissions of parties we are in agreement with the contention of the respondent that art. 35.2 of PSC does not govern the arbitration agreement, as the latter is a distinct and separate agreement from the underlying agreement. This is further fortified by the fact that by virtue of art. 34.12 of the PSC, the arbitration agreement in the present case is governed by the laws of England. Under s. 7 of the English Arbitration Act 1996, arbitration agreement is to be treated as a distinct agreement from the underlying agreement. This finds support in the case of *Heyman v. Darwins Ltd* [1942] AC 356 per Lord Macmillan at p. 374 where he stated:

> ... And there is this very material difference, that whereas in an ordinary contract the obligations of the parties to each other cannot in general be specifically enforced and breach of them results only in damages, the arbitration clause can be specifically enforced by the machinery of the Arbitration Acts. The appropriate remedy for breach of the agreement to arbitrate is not damages, but its enforcement ...

(See also *Union of India v. McDonnell Douglas Corp* [1993] 2 Lloyd's Rep 48).

[41] Following the above, we hold that the arbitration agreement contained in art. 34 of the PSC ought to be treated as a separate and distinct agreement from the underlying contract. On that premise we agree with respondent that art. 35.2 of the PSC does not apply to the arbitration agreement.

[42] Our view in this regard is further supported by the term "unless the parties otherwise agree" found in art. 34.12. This in our opinion distinctively gives parties to the arbitration agreement the right to change the juridical seat of arbitration. The consent order reached in London was in our view made by the arbitration tribunal in pursuant of this provision. Further the contention of the appellant that to change the seat of arbitration requires the consent of "all the parties" as stipulated by art. 35.2 could not stand up to scrutiny as art. 34.12 specifically employs the term "the parties" instead of "all the parties" which is found in art. 35.2 of the PSC. Further, we hold that the term "the parties" in art. 34.12 refer to the parties to the arbitration

rather than "all the parties" to the PSC. We further agree that it could not be the intention of the parties that any change in the juridical seat of arbitration should require the consent of "all the parties" who may not be parties to the arbitration. For those reasons, we hold that the term "the parties" in art. 34.12 is clearly directed to parties to the arbitration as distinct from parties to the PSC.

[43] On the above premise, our answer to the second question is that art. 35.2 has no application to the arbitration agreement which is governed specifically by art. 34 of the PSC.

Question 3

Whether The Respondent Is Precluded By Estoppel And Res Judicata Following The Judgment Of The Indian Supreme Court From Contending That The Juridical Seat Has Shifted Away From Kuala Lumpur?

[44] It is the appellant's case that the issue of juridical seat of arbitration came for consideration of the Indian Supreme Court. This came about because the respondent had submitted on this issue to the Indian Supreme Court and the court had ruled on it. This is found in paras. 12 and 13 of the judgment of the court the relevant part of which read:

> 12. We shall first consider the question whether Kuala Lumpur was the designated seat or juridical seat of arbitration and the same had been shifted to London. In terms of clause 34.12 of the PSC entered into by 5 parties, the seat of arbitration was Kuala Lumpur, Malaysia. However, due to outbreak of epidemic SARS, the arbitral tribunal decided to hold its sittings first at Amsterdam and then at London and the parties did not object to this. In the proceedings held on 14th and 15th October, 2003 at London, the arbitral tribunal recorded the consent of the parties for shifting the juridical seat of arbitration to London. Whether this amounted to shifting of the physical or juridical seat of arbitration from Kuala Lumpur to London? The decision of this would depend on a holistic consideration of the relevant clauses of the PSC. Though, it may appear repetitive, we deem it necessary to mention that as per the terms of agreement, the seat of arbitration was Kuala Lumpur. If the parties wanted to amend clause 34.12, they could have done so only by written instrument which was required to be signed by all of them. Admittedly, neither there was any agreement between the parties to the PSC to shift the juridical seat of arbitration from Kuala Lumpur to London nor any written instrument was signed by them for amending clause 34.12. Therefore, the mere fact that the parties to the particular arbitration had agreed for shifting of the seat of arbitration to London cannot be interpreted as anything except physical change of the venue of arbitration from Kuala Lumpur to London ...
>
> 13. A reading of the above reproduced provision shows that under the English law the seat of arbitration means juridical seat of arbitration, which can be designated by the parties to the arbitration agreement or by any arbitral or other institution or person empowered by the parties to do

A so or by the arbitral tribunal, if so authorised by the parties. In contrast, there is no provision in the Act under which the arbitral tribunal could change the juridical seat of arbitration which, as per the agreement of the parties, was Kuala Lumpur. Therefore, mere change in the physical venue of the hearing from Kuala Lumpur to Amsterdam and London did not amount to change in the juridical seat of arbitration.

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[45] In short, what the Indian Supreme Court held was that the only way in which the change in the juridical seat can occur is by way of an amendment to cl. 34.12 and this would require the consent of all parties to the PSC and this must be evident in writing as required by art. 35.2. On those grounds, the Indian Supreme Court held that the consent order entered by the arbitral C tribunal in London on 14 November 2003 and 15 November 2003 merely had the effect of shifting the geographical seat of arbitration and not the juridical seat which remained at Kuala Lumpur. Learned counsel for the appellant contended that with that finding by the Indian Supreme Court, the respondent is now barred, by issue estoppel and *res judicata*, from relitigating D the issue before the Malaysian court.

[46] On the contrary, the respondent contended that in the OMP before the Delhi High Court, the respondent had raised a preliminary issue on the question of jurisdiction and maintainability of the OMP. For that reason, the Delhi High Court on 30 April 2008 did not decide on the merits of the seat E of arbitration but confined itself to the issue of jurisdiction, where it ruled that it had jurisdiction to hear the OMP. It was against this ruling that the respondent filed the SLP to the Supreme Court of India. This according to the respondent is supported by the statement of issue in para. 2 of the judgment of the Supreme Court which reads:

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> 2. Whether the Delhi High Court could entertain the petition filed by the respondents under section 9 of the Arbitration and Conciliation Act, 1996 (for short, "the Act") for grant of a declaration that Kuala Lumpur (Malaysia) is contractual and juridical seat of arbitration and for issue of a direction to the arbitral tribunal to continue the hearing at Kuala G Lumpur in terms of clause 34 of Production Sharing Contract (PSC) is the question which arises for consideration in this appeal.

[47] This is further fortified by the answer given by the Supreme Court in para. 19 of the judgment which reads:

> 19. In the present case also, the parties had agreed that notwithstanding H Article 33.1, the arbitration agreement contained in Article 34 shall be governed by laws of England. This necessarily implies that the parties had agreed to exclude the provisions of Part I of the Act. *As a corollary to the above conclusion, we hold that the Delhi High Court did not have the jurisdiction to entertain the petition filed by the respondents under Section 9 of the Act and the mere fact that the appellant had earlier filed similar petitions was not sufficient to* I *clothe that High Court with the jurisdiction to entertain the petition filed by the respondents.*
>
> (emphasis added)

[48] Having ruled that the Delhi High Court lacks jurisdiction to entertain the petition by the appellant (respondent in the SLP), therefore as rightly contended by the respondent, it was no longer necessary for the Indian Supreme Court to delve into the issue of the seat of arbitration. Accordingly, we hold that whatever ruling and/or observation made by the Indian Supreme Court on that issue is of no consequence and do not have the effect of barring the respondent from re-agitating the issue before the Malaysian Court. It is our respectful view that once the Indian Supreme Court ruled in favour of the respondent in the SLP which was strictly confined to the issue of jurisdiction of the Delhi High Court, then the matter should appropriately end there.

[49] In light of the above, we hold that any ruling made by the Indian Supreme Court beyond the issue of jurisdiction must be taken as mere *obiter dicta* with no binding effect on the parties. Hence, as rightly submitted by learned counsel for the respondent the observation of the Indian Supreme Court at paras. 12 and 13 of its judgment could not be pleaded as *res judicata* barring the respondent from raising the same before the Malaysian courts. It is trite law that a decision of a court not clothed with the necessary jurisdiction would not give rise to *res judicata*. (See *Sri Athmanathaswami Devasthanam v. K Gopalswami Ayyangar* (1964) 3 SCR 763; *Hasham Abbas Sayyad v. Usman Abbas Sayyad and Others* (2007) 2 SCC 355; *Muthavalli of Sha Madhari Diwan Wakf, SJ Syed Zakrudeen and Another v. Syed Zindasha and Another* (2009) 12 SCC 280; *Syed Mohd Salie Labbai (Dead) by LRs and Others v. Mohd Hanifa (Dead) by LRs and Others* (1976) 4 SCC 780).

[50] The authority on point is a decision of the Court of Appeal in *Golden Vale Golf Range & Country Club Sdn Bhd v. Hong Huat Enterprise Sdn Bhd* [2008] 6 CLJ 31 at pp. 37-38 where Gopal Sri Ram JCA candidly observed:

> Learned counsel for the plaintiff drew our attention to certain passages in the judgment of Siti Norma Yaakob JCA in which the merits of the case appear to have been discussed. The comments in these passages are mere *obiter dicta* and do not constitute the *ratio* of the case. It is only the ratio of the case which is binding between parties to a dispute or their successors … Further, to constitute *res judicata*, "the earlier judgment must, in terms of the Privy Council decision in *Kok Hoon v. Leong Cheong Kweng Mines Ltd* [1964] MLJ 49 at p. 53, 'necessarily and with precision' determine the point in issue" ... These issues were not at stake before this court in the earlier proceedings. It is therefore our judgment that the plea of *res judicata* cannot succeed.

[51] Similar observation is found in the Indian case of *Pawan Kumar Gupta v. Rochiram Nagdeo* (1999) 4 SCC 243 at 250 which reads:

> 19. Thus the sound legal position is this: if dismissal of the prior suit was on a ground affecting the maintainability of the suit any finding in the judgment adverse to the defendant would not operate as *res judicata* in a subsequent suit. But if dismissal of the suit was on account of

A extinguishment of the cause of action or any other similar cause a decision made in the suit on a vital issue involved therein would operate as *res judicata* in a subsequent suit between the same parties. It is for the defendant in such a suit to choose whether the judgment should be appealed against or not. If he does not choose to file the appeal he cannot thereby avert the bar of *res judicata* in the subsequent suit.

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[52] Question no. 3 also raises the issue of whether estoppel would apply against the respondent in the circumstances of this case. Estoppel may be invoked in order to prevent a party from relitigating against a counter party, an issue, be it of fact or law after the same had been previously contested or decided in an earlier litigation between the same parties. (See generally P Ramanatha Aiyar, '*The Law Lexicon*' 2nd edn Reprint, 2010, LexisNexis at pp. 656-657).

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[53] It is settled law that for issue estoppel to operate against a party the decision on an issue must have been a "necessary step" to the decision or "a matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision" (See *Carl Zeiss Stiftung v. Rayner & Keeler Ltd (No. 2)* [1967] 1 AC 853 at p. 965). To put it simply, the issue in question must have been litigated between the parties and the issue was material to the decision of the court.

D

E **[54]** In the present case, as rightly submitted by learned counsel for the respondent, the issue of seat of arbitration could not fall within the above definition, as the primary issue before the Indian Supreme Court was whether the Delhi High Court has jurisdiction to entertain the OMP No. 255 of 2006, which was answered in the negative.

F **[55]** For the above reason, we hold that the respondent is not barred by issue estoppel from litigating the same before the Malaysian Court.

[56] For the above reasons, our answer to Question No. 3 is in the negative.

G **[57]** In the result, the appeal is dismissed with costs.

[58] This judgment is delivered pursuant to s. 78(1) of the Courts of Judicature Act 1964, as our learned brothers Justice Abdull Hamid Embong and Justice Mohamed Apandi Ali FCJ had since retired.

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